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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 01 100 54098 Office: CALIFORNIA SERVICE CENTER Date: FEB 06 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

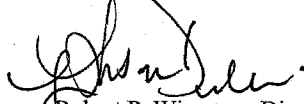
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of California in January of 1999. It proposes to be engaged in the business of importing and distributing ophthalmic pharmaceutical products. Currently it appears to be engaged in a photo and video retail operation. It seeks to employ the beneficiary as its chief operating officer. Accordingly, it endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary's duties had been or would be executive or managerial in nature.

On appeal, counsel for the petitioner contends that sufficient evidence has been submitted to demonstrate that the beneficiary will be employed in an executive or managerial capacity.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification

is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the petitioner has established that the beneficiary had been and would be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It is noted that the petitioner does not clarify whether the beneficiary claims to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

The petitioner initially stated that the beneficiary would be directing the overall functions of the corporation. The petitioner also stated that the beneficiary employed three individuals including the beneficiary as of the date of filing.

The director requested a more detailed description of the beneficiary's duties in the United States. The director also requested a description of job duties for all the employees under the beneficiary's supervision. The director further requested a copy of the petitioner's organizational chart.

In response, the petitioner through its counsel provided the following description of the duties performed by the beneficiary:

He plans and develops aspects of the U.S. investment of [sic] establishes both the short and long term goals and policies of the corporation. He is responsible for the overall direction of the corporation. He makes decisions as to the areas in which he concentrates marketing efforts and makes decisions regarding the methods of distribution and analysis of market trends and economic conditions. He oversees the negotiations for substantial purchase contracts. He makes personnel decisions for management and all employees. In his sole discretion, he controls the financial aspects of the corporation, including receiving and disbursing funds, and acquiring debt. He approves and signs all major contracts. He conducts all legal negotiations on behalf of the corporation. He receives only general supervision or direction. Management and all employees report directly to [the beneficiary].

The petitioner also stated that the beneficiary looked after the day-to-day activities such as signing contracts, overseeing the operation of the business, following marketing trends, attending meetings, returning phone calls, giving instructions to employees, attending to legal matters, looking after the company's investments, making key decisions, and controlling the financial aspect of the corporation, and staying in contact with the parent company. The petitioner through its counsel noted that the petitioner employed a secretary/desk clerk, a general manager, and also used an outside accountant.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120 for the year 2000 noting that it was doing business as "Dana Photo Video." The IRS Form 1120 revealed that the petitioner had paid the beneficiary \$16,500 as an officer and had paid \$16,961 in salaries.

The director determined that the beneficiary would be a first-line supervisor of non-professional employees and that the beneficiary would also be involved in day-to-day non-supervisory duties that are common place in the industry. The director concluded that the record did not support a finding that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the Service erred when it failed to consider the reasonable needs of the petitioner. Counsel also asserts that the petitioner is a two-year old company that is waiting for Federal Drug Administration approval to import and market ophthalmic pharmaceutical products. Counsel also asserts that the petitioner's secretary, general manager, and accountant handle the day-to-day non-supervisory duties of the company. Counsel also submits two IRS Form W-2, Wage and Tax Statements for the year 2001 revealing wages paid to an individual in the amount of \$10,685.01 and to another individual in the amount of \$1,064.

Counsel's assertions and evidence are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner submitted a broad and general description of the beneficiary's duties for the petitioner. The Service is unable to determine from the description provided whether the beneficiary's duties relate to the current photo and video retail business of the petitioner or whether the duties relate to the proposed pharmaceutical business of the petitioner. Moreover, the position description provided refers, in part, to responsibilities for marketing, decision-making regarding distribution, negotiating purchase contracts, and controlling the financial aspects of the company. The Service is unable to determine from these broad statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. However, we do note that the brief

description of job duties performed by the petitioner's secretary, general manager, and part-time outside accountant do not include activities such as market research, contract negotiation, or basic banking tasks. As determined by the director, and contrary to counsel's assertion, the beneficiary is the only individual performing these basic operational tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner's further response identifying the beneficiary's daily activities of signing contracts, following market trends, attending meetings, returning phone calls, and looking after the company's investments confirms that the beneficiary is performing the necessary operational tasks of the company.

In addition, the petitioner has not provided consistent supporting evidence that it employs the two individuals identified as the secretary and general manager at the salaries noted in the response to the director's request for evidence. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). On appeal, counsel for the petitioner submits two IRS Form W-2s issued to two individuals in 2001. One W-2 issued to the secretary/desk clerk is in the amount of \$10,6855.01, a sum inconsistent with the annual salary to be paid to the secretary/desk clerk as noted in the response to the director's request for evidence. The second W-2 is issued to an individual whose position has not been identified and is in the minimal amount of \$1,064. This sum also is inconsistent with the annual wage to be paid to the general manager the petitioner's only other employee in addition to the beneficiary and the secretary/desk clerk. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

Although it appears the director based his decision partially on the size of the enterprise, it is not clear that the director considered the reasonable needs of the enterprise. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Service must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing the petitioner was a two-year-old company that claimed to be engaged in the import and distribution of pharmaceutical products. However, as noted on the petitioner's tax returns that were provided in response to the director's request for evidence, the petitioner was engaged in a retail photo

and video operation. The petitioner's attempts to establish contacts for the future distribution of pharmaceutical products is noted, however, at the time of filing the petitioner was not actively engaged in the continuous, systematic, and regular operations of such a business. See 8 C.F.R. 214.2(1)(1)(ii)(H). The petitioner provides little information on its operations as a photo and video enterprise. The petitioner's description of the secretary/desk clerk includes duties that are secretarial in nature. The petitioner's description of the general manager's duties includes general office duties. It is not possible to determine if these descriptions relate to the current operation of the petitioner as a photo and video enterprise or the proposed operation of the petitioner as an importer and distributor of pharmaceutical products. In either case, the petitioner has not provided sufficient evidence to demonstrate that its reasonable needs have been plausibly met by the beneficiary as the chief operating officer, a part-time general manager, and a secretary/desk clerk. Based on the petitioner's lack of information on this issue, it is not possible to determine if the reasonable needs of the company could plausibly be met by the services of the staff on hand at the time the petition was filed. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily executive or managerial capacity. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel's implied assertion that the company will grow once it has received approval from the Federal Drug Administration to import and market ophthalmic pharmaceutical products is not relevant to the proceeding at hand. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45,49 (Comm. 1971).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties fail to sufficiently describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not sufficiently demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The

petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not sufficiently established that the beneficiary's overseas position was in a managerial or executive capacity. The organizational chart and the description of the beneficiary's duties for the claimed parent company reveal an employee with first-line supervisory duties at most.

Also beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$33,500 per year. The petitioner has not provided evidence that it has paid the beneficiary even half the proffered wage in the past. The petitioner's latest IRS Form 1120 for 2000 reveals that the petitioner's net income does not allow for the increase in the beneficiary's wage of \$17,000 or more.

As the appeal will be dismissed for the reason stated above, these issues are not examined further.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.